NO. 82-927

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

FRANCIS X. BELLOTTI,
ATTORNEY GENERAL, et al.,

Appellants,

v.

MICHAEL J. CONNOLLY, et al.,

Appellees.

SUPPLEMENTAL JURISDICTIONAL STATEMENT OR PETITION FOR CERTIORARI

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QUESTION PRESENTED

The sole new issue presented by this Supplemental Jurisdictional Statement as a result of the recently issued opinion of the Massachusetts Supreme Judicial Court is:

Whether this Court may review a decision of the highest court of a state concerning the proper construction of state statutes where that construction is predicated entirely on an erroneous view of federal constitutional requirements.

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On December 3, 1982, the Attorney General of the Commonwealth of Massachusetts (the Attorney General) filed a Jurisdictional Statement seeking review of a final judgment entered by the Supreme Judicial Court of Massachu-

setts in this case. At the time the Attorney General filed his Jurisdictional Statement, the Supreme Judicial Court had not rendered a written opinion explaining its action. Accordingly, the Attorney General simultaneously filed a motion to defer consideration and requested leave to file a supplement to the Jurisdictional Statement within thirty days after the issuance of the Supreme Judicial Court Opinion.

The opinion was issued on February 16, 1983 and the Attorney General now submits this Supplement to augment his prior Jurisdictional Statement. He continues to rely on that earlier pleading and offers this Supplement only to address those issues raised by the written opinion of the Supreme Judicial Court that could not have been addressed at an earlier time.

OPINION BELOW

On February 16, 1983, the Supreme Judicial Court issued its opinion. The opinion is reported at 388 Mass. 185 and is also reproduced in the Appendix at the end of this brief.

JURISDICTION

The Massachusetts Supreme Judicial Court upheld the constitutionality of the Massachusetts statutory scheme for obtaining access to the state primary ballot in light of a challenge that the statutes, as enforced by the Massachusetts State Secretary, violated the United States constitution. Although the Attorney General did not rest his challenge to the Secretary's action specifically on these grounds, he nevertheless invokes this Court's appellate

jurisdiction under 28 U.S.C. §1257(2). The co-plaintiffs who specifically raised federal constitutional issues below have also appealed from the Supreme Judicial Court's decision, Langone v. Connolly, No. 82-936. Their appeal, docketed December 6, 1983, 51 U.S.L.W. 3470, likewise invokes this Court's appellate jurisdiction. The Attorney General requests that his Jurisdictional Statement be treated in conjunction with the co-appellants' Statement.

To the extent that the Court finds that the Attorney General's appeal under 28 U.S.C. §1257(2) is improper, he respectfully requests, pursuant to 28 U.S.C. §2103, that his Juridictional Statement and his Supplemental Jurisdictional Statement be treated as a Petition For Certiorari under 28 U.S.C. §1257(3).

THIS CASE RAISES AN IMPORTANT FEDERAL QUESTION WHICH DESERVES PLENARY CONSIDERATION BY THIS COURT.

I. Because The Supreme Judicial Court Felt Compelled By The Federal Constitution To Rule As It Did, This Case Presents A Federal Question Within This Court's Jursidiction.

This case presents a conflict between the right of the state to control the conduct of primary elections and the right of members of a state political party to associate for political purposes. The Massachusetts Supreme Judicial Court attempted to resolve the conflict by engaging in a simple exercise in statutory construction of the state election laws. Those laws set forth specific prerequisites for gaining access to the primary ballot, but do not explicitly provide for the enforcement of a

newly-adopted rule of the State Democratic Party which requires candidates to first obtain 15% of the party's convention vote before obtaining a place on the state primary ballot.

The Supreme Judicial Court posited two alternative constructions of the statutory scheme and adopted one because it found that the other would violate the United States Constitution. According to the Court's reasoning, the statutory scheme could be construed as either "providing the only requirements for primary ballot access excluding all others, or, in the alternative as providing minimum requirements for primary ballot access but permitting imposition by the party of additional requirements that are consistent with the primary election system and do not infringe the constitutional rights of candidates and voters." App. 11.

Although normal rules of statutory construction clearly favored the former construction, the state court rejected it and opted for the latter, non-exclusive reading of the law.

The state court's decision was expressly based on the erroneous belief that a construction of the statutes which left the enforcement of the 15% rule to the political party itself and which would allow candidates who had not recieved 15% of the convention vote to be placed on the primary ballot "would substantially interfere with the fundamental rights of association guaranteed to the party and its members by the First and Fourteenth Amendments," App. 24, and thus would render Chapter 53 unconstitutional. Id., App. 11. See also, Opinion of the Justices, 385 Mass. 1201, 434 N.E. 2d. 960 (1982). The

Court, therefore, adopted the second construction and incorporated the State Democratic Party's 15% rule into the Massachusetts legislative scheme. Id.

A plain reading of the court's opinion demonstrates that the court incorporated the party rule "not as a matter of statutory construction, but because it thought the Federal Constitution required such action." Red Cross Lines v. Atlantic Fruit Co., 264 U.S. 109, 120 (1924). Out of deference to its mistaken view of federal law, the Supreme Judicial Court abandoned its basic rules of statutory construction.1/

1/ Ordinary statutes are construed according to their plain meaning in light of their legislative history so as to accomplish the purpose of their enactment. Commonwealth v. Galvin, 388 Mass. 326, __ N.E. 2d. ___, (1983), Board of Education v. Assessor of Worcester, 368 Mass. 511, 513, 333 N.E. 2d. 450, (1975).

The court ignored the literal words of the statutes that "the nomination of candidates shall be by nomination paper," G.L. c.53, §44, and that "no candidate shall be nominated . . . in any other manner than is provided in this chapter or chapter fifty-two". G.L. c.53, §2. While the court paid lip service to these provisions, App. 10, nowhere in the body of its opinion did it deal with the import of these phrases. Similarly, the court ignored the relevant legislative history. The Massachusetts legislature had in the past provided for binding and non-binding nominating conventions, but had abolished conventions in favor of a binding primary system. See 1973 Mass. Acts c.429. Finally, and most egregiously, the court ignored the fact that the Massachusetts legislature had

passed a bill explicitly providing that the statutes were to be considered as setting the only qualifications for access to primary ballots. It was only because the justices of the Supreme Judicial Court expressed an opinion that the bill would violate federal guarantees of political association that the bill failed enactment. See Opinion Of The Justices, 385 Mass. 1201, 434 N.E. 2d. 960 (1982). Thus, but for the state court's twice articulated view of the requirements of the federal constitution, state law-makers would have eliminated any ambiguity in the statutory scheme and made the state's control over ballot qualifications exclusive.

Generally, the construction of a state statute by the highest court of a state is binding and dispositive and

does not give rise to a federal question. Quongham Wah Co. v. Industrial Accident Comm. of California, 255 U.S. 445, 446-47 (1921). However, this case falls within an exception to that general rule since the Supreme Judicial Court's construction was premised solely upon an erroneous view of the federal constitution. Under these circumstances, the Massachusetts Court's opinion is not insulated from further review by this Court, because, "this basis for construing a state statute creates a federal question." United Air Lines v. Makin, 410 U.S. 623, 630 (1973).

The Court's decision rested solely on federal grounds and was based exclusively upon its reading of this Court's decision in Democratic Party of the United States v. Wisconsin, 450 U.S. 107

(1981), (hereinafter Wisconsin). App. 23-24. The Supreme Judicial Court obviously "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. [This court, therefore, has] jurisdiction and should decide the federal issue. . . ." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1976), See also, St. Martin Evangelical Lutheran v. South Dakota, 451 U.S. 772, 780 n.9 (1981).

II. The Decision Of The Massachusetts Supreme Judicial Court Was Based On An Erroneous Understanding Of Federal Constitutional Law.

A. Introductory Analysis

The Supreme Judicial Court required the state to enforce the Democratic Party rule because, in its view, if the state

did not enforce the rule the party's right of political association would be unconstitutionally burdened.

The burden which the court found derived from the fact that independent voters could: sign the nomination papers of Democratic candidates, enroll in the Democratic party on the day of the primary election, vote for a Democratic candidate, and re-enroll as independent voters after the primary. App. 23-24. The court found that these "realities", coupled with a statutory scheme that did not require the state to enforce the party's 15% rule, would effectively eliminate the party's control over the selection of its candidates in general elections and therefore would amount to "a substantial interference with the fundamental rights

of association guaranteed to the party and its members by the First and Fourteenth Amendments." App. 24.

The court's reasoning is flawed in three respects. First, the court below misconstrued the precedent set in Wisconsin. Second, the court improperly identified a burden on associational rights of the Democratic Party and its members and third the court failed to recognize the compelling state interest which justifies any burden that the statutes may place impose.

B. The Supreme Judicial Court Misconstrued The Precedent Set In Wisconsin.

The only authority the Supreme Judicial Court cited to support its finding of a substantial interference with associational rights was Wisconsin. The court below misunderstood this

Court's holding in Wisconsin and misapplied its reasoning to the facts of the current controversy.

The Supreme Judicial Court's misunderstanding of the Wisconsin decision is highlighted by the court's repeated reference to the Wisconsin statute that this Court supposedly held unconstitutional. App. 18-23. A careful reading of the decision reveals that no statute was declared unconstitutional. In fact, this Court was very careful to point out that the right of the state of Wisconsin to conduct an open primary was not challenged.[2/]

2/ This Court expressly stated that, "The question in this case is not whether Wisconsin may conduct an open primary election if it chooses to do so. . ." Wisconsin at 120.

The issue decided in Wisconsin was expressly and appropriately limited to whether "the state may compel the national party to seat a delegation chosen in a way that violates the rules of the Party." Id. at 121. The Court's answer to this question derived from the unique role played by national political party nominating conventions. The narrowness of the Wisconsin holding is further reflected by this Court's single citation to Cousins v. Wigoda, 419 U.S. 477 (1975), as support for its conclusion. Wisconsin at 121. This Court reviewed the earlier Cousins decision finding that, "[t]he court reversed the state judgment holding that 'Illinois' interest in protecting the integrity of its election process cannot be deemed compelling in the context of the

selection of delegates to the National Party Convention." Cousins at 491. That disposition controls here." Wisconsin at 121.

The Supreme Judicial Court has expanded this decision beyond the question of seating delegates at national nominating conventions. In the Supreme Judicial Court's view all conflicts between state law and state party rules must be resolved in favor of the party rule.[3/]

3/ The dissent in the Wisconsin decision seems to have anticipated such a misunderstanding. "In evaluating the constitutional significance of this relatively minimal state regulation of party membership requirements, I am unwilling, at least in the context of a claim by one of the two major political parties, to conclude that every conflict between state law and party rules

(footnote continued)

The lower court's justification for its distorted reading of the Wisconsin decision rested upon its belief that the decision's focus was on the nature of the purported interference with the associational rights of the party and its members. To the extent that the nature of the interference is of importance, the court below failed to recognize the critical distinction between the Wisconsin and the Massachusetts statutory schemes. The Wisconsin statutes required the national party to seat delegates who were obligated to

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(footnote continued)

concerning participation in the nomination process creates a burden on associational rights. Wisconsin at 130, (Powell, J. dissenting)

follow the will of individuals who did not belong to the party. The Massachusetts scheme, however, permits only individuals who publicly and openly declare their affiliation with the Democractic Party to take part in the nominating process. The Massachusetts statutes do not impose the type of burden on political parties which this Court discussed and rejected in the Wisconsin decision. Neither Wisconsin nor Cousins has any applicability beyond the context of state regulations that purport to govern the seating of delegates at national nominating conventions. They do not support the decision of the court below.

C. The Supreme Judicial Court Erroneously Found That The State's Non-enforcement Of The 15% Rule Would Burden The Associational Right Of The State Party and Its Members.

The second fundamental error in the Supreme Judicial Court's opinion is the finding that the Massachusetts statutory scheme, which does not provide for the enforcement of the 15% rule, burdens the right to political association enjoyed by the state Democratic Party and its members. The court below found that the state statutes burden the state party's associational right both by eliminating the 15% rule and by allowing the participation of newly enrolled party members in the nominating process.

Contrary to the assertions of the Supreme Judicial Court, the Massachusetts statutes do not (and would not, if construed properly) nullify, App. 23 or

preclude, App. 17 or eliminate, App. 16, 23 the 15% rule. The party is free to adopt the rule and to enforce the rule in any manner it chooses. For example, it can refuse to endorse or recognize candidates that receive less than 15% of the convention vote. It can withhold funds or other support from those candidates. It can take any type of disciplinary action provided by its charter against those candidates that seeks to violate its 15% rule. The Massachusetts statutory scheme does not preclude the party from adopting or enforcing such a rule anymore than it precludes the party from conducting a convention. The statutes merely provide that if the party, on its own, conducts a convention and adopts a 15% rule, the party, not the state, has the responsi-

bility to enforce the rule. As this court found in Wisconsin, it is possible to both preserve the state primary system and to allow the party to enforce its own rules. Wisconsin at 126.

The Supreme Judicial Court also erroneously concluded that the state statutes burdened party members' right to political association because previously unenrolled voters are allowed to enroll in the party on the day of the primary and to take part in the nominating process. App. 23-24. The court found that the participation of individuals who "may have only a tenuous affiliation with the party," App. 23, burdens the right of members with more substantial affiliation to control the election of the party's candidates.

There is no basis in law or fact for limiting the constitutional rights of political association based upon the duration of the association. New members of the Democratic party have as much right to associate with the party and to seek to control the nomination process as those individuals who have been enrolled Democrats for substantially longer periods of time. To suppose that individuals who enroll in the party for purposes of the primary election do not share the common goals of party members of long standing is to ignore political reality. For an independent voter to openly and public enroll in the Democratic party and to vote in the Democratic primary, forsaking participation in the primary of any other political party, is certainly a substantial indication of that voter's

political philosophy.

> Independents and members of other parties who seek to participate in a party primary will do so precisely because they identify with the community of interest, if indeed one exists. Their very motive for participating in the primary would be to associate with a party presenting, "candidates and issues more responsive to their immediate concerns." Wisconsin, at 132 n.5, (Powell, J. dissenting) (citations omitted).

The Supreme Judical Court attempted to bring its reasoning within the majority decision in Wisconsin by adopting the logic of the minority opinion. The court below found that participation of recent Democrats in the Democratic primary was equivalent to participation by Republicans in the Democratic National Nominating Convention. According to the court below, the burden on the associational

rights of party members is the same whether Republicans are allowed to participate or whether recently enrolled Democrats are allowed to participate. To support this notion, the Court cited the dissent in the Wisconsin decision for the proposition that the distinction between open and closed primaries has become blurred. App. 22. Of course, in the view of the dissenting Justices even an open primary which allows Republicans to take part in the nominating process of the Democratic party did not constitute a substantial burden on associational freedom of members of the Democratic party. See Wisconsin at 134. The Massachusetts closed primary which allows recently enrolled Democrats to participate does not constitute a burden, let alone a substantial one.

D. The Supreme Judicial Court Improperly Failed To Consider The Compelling State Interest.

The third critical error in the Supreme Judicial Court's opinion, stems from it failure to even examine the question of whether there was a sufficiently compelling state interest to justify the burden it found to have been placed on the Democratic Party's associational rights. To the extent that the Massachusetts statutory scheme does impose some burden on the associational right of the Democratic party and its members, the Attorney General submits that burden is justified by a sufficiently compelling state interest. "Neither the right to associate nor the right to participate in political activity is absolute." United States Civil Service Commission v. National

Association of Letter Carriers, 413 U.S. 548 (1973). The right of the state to conduct and regulate a primary election can not be denied. United States v. Classic, 313 U.S. 299 (1941). A state statutory scheme that sets forth uniform minimum requirements for obtaining access to primary ballots is directed towards the compelling state interest of maintaining the integrity of the electoral process. The establishment of the primary system open to independent voters who enroll in the party on the day of the primary is designed to encourage increased voter participation and to eliminate dominance by political bosses. See State Ex Rel LaFollette v. Democratic Party, 93 Wis. 2d. 473, 492, 287 N.W. 2d. 519, 527 (1980) rev'd. sub, nom, Democratic Party of U.S. v. Wisconsin, 450 U.S. 107 (1981).

These state interests are compelling and relate directly to the conduct of the primary election. The facts and equities present here make this case markedly different from Wisconsin and Cousins where the state interests were recognized as valid but were not viewed as sufficient to justify the substantial intrusion into the internal operation of the National Nominating Convention. The Supreme Judicial Court, blinded by its duties to avoid constitutional problems, failed to recognize this distinction. This Court should, therefore, grant plenary consideration of this matter and relieve the Supreme Judicial Court of the compulsion to interpret the statutes as it did. For this Court to allow the Supreme Judicial Court's decision "to stand as it is would risk an affirmance

of a decision which might have been decided differently if the court below had felt free, under [this Court's] decisions, to do so." Perkins v. Denguet Mining Co., 342 U.S. 437, 443 (1952).

CONCLUSION

The Supreme Judicial Court rejected an interpretation of the Massachusetts election law because of a misunderstanding of the federal constitutional principles involved. That error presents an important federal question that deserves the plenary consideration of this Court. For these reasons and those articulated in the Attorney General's prior submission, this Court should note probable jurisdiction or grant certiorari.

Respectfully submitted,

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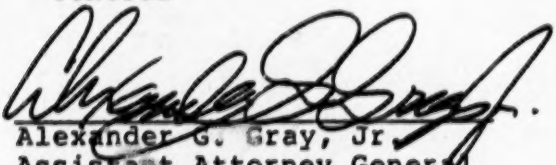

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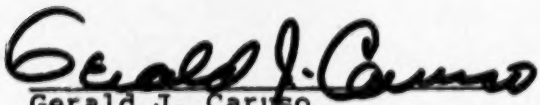

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S-2889 S.J.C.

FREDERICK C. LANGONE & others[1] vs. SECRETARY OF THE COMMONWEALTH & others.[2]

O'CONNOR, J. Frederick C. Langone, four voters who claimed to be supporters of Langone's candidacy for Lieutenant Governor of the Commonwealth, and the Langone for Lieutenant Governor Committee, brought this action in the Superior Court against the Secretary of the Commonwealth. The complaint alleged

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1/ Madeline G. Sarno, Victor Grillo, Louis Ferretti, Gail A. Fasano, referred to herein as the Langone supporters, The Langone for Lieutenant Governor Committee, Joel M. Pressman, and plaintiff-intervenor, Francis X. Bellotti, as Attorney General of the Commonwealth.

2/ The Democratic State Committee, Evelyn F. Murphy, Samuel Rotondi, Louis R. Nickinello, John F. Kerry, and Lois E. Pines.

that, by refusing to print Langone's name on the September 14, 1982, Democratic State party primary ballot as a candidate for the party's nomination for Lieutenant Governor, the Secretary deprived the plaintiffs of various rights provided by statutes of the Commonwealth and guaranteed by the United States and Massachusetts Constitutions. An injunction was sought that would have required the Secretary to place Langone's name on the primary ballot. The other defendants, whose names appeared on the primary ballot, and Joel M. Pressman, as plaintiff, were added to the case on the Secretary's motion. The Attorney General intervened as a plaintiff and filed a complaint seeking declaratory relief and an order requiring the Secretary to place the

names of Langone, Pressman, and "other candidates who have fully complied with all applicable statutory requirements imposed by G.L. c. 53, on the ballot for the state primary for the Democratic Party, notwithstanding any contrary provision of the party charter."

A single justice of this court allowed a joint "Petition for Transfer" to the Supreme Judicial Court for Suffolk County, and on a motion by all the parties, reserved and reported to the full court the following questions of law:

"1. Whether all candidates who have complied with applicable statutory requirements must appear upon the Democratic state primary ballots, notwithstanding the failure to obtain at least fifteen percent of the vote on any

ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth'?

"2. Whether the decision by the Secretary of the Commonwealth that he will not place upon the Democratic state primary ballots those candidates who failed to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth', but otherwise complied with the statutory requirements to have their names placed upon the ballots violated the constitutional or statutory rights of the voters, the candidates, or their supporters?"

On July 6, 1982, we issued an order that said "[u]pon consideration of the argument and briefs of the parties, we interpret the State statutes in light of the State and Federal constitutions and rule that the Secretary must give effect to the relevant charter provision. Accordingly, we answer the questions reported, 'No.'" This opinion is an explanation of that order.

On April 23, 1982, the Justices of this court issued an advisory opinion to the Governor. Opinion of the Justices, 385 Mass. 1201 (1982). The first sentence of G.L. c. 53, §44, as amended through St. 1981, c. 278, §1, states, "The nomination of candidates for nomination at State primaries shall be by nomination papers." There was pending before the Governor for his

approval, House Bill No. 5852, which would have added, after that sentence, the following sentence: "Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination at the state primary." The proposed language, if constitutional, would have rendered ineffective Article Six, Section III, of the charter of the Democratic party of the Commonwealth of Massachusetts which provides: "There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements

for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election." This is popularly known as the 15% rule. The Justices interpreted the proviso to mean that a convention nominee who fails to receive at least 15% of the convention vote on any ballot is not entitled to have his or her name placed on the primary ballot. Id. at 1025. The Justices advised the Governor that "[i]f House No. 5852 were approved, G.L. c. 53, §44, as thereby amended, would abridge the constitutional rights of the

Democratic party and its members to associate by allowing candidates to be placed on the Democratic State primary ballot in contravention of the party's charter." Id. at 1207-1208.

On May 21 and 22, 1982, the State Democratic party held its convention for the purpose of endorsing its candidates for statewide office. The defendants Murphy, Rotondi, Kerry, Pines, and Nickinello received at least 15% of the convention vote cast on one or more ballots. The plaintiffs Langone and Pressman failed to obtain at least 15% of the vote on any ballot. On May 25, 1982, the chairman of the Democratic State Committee sent a certified copy of the party charter to the Secretary and gave him the names of those individuals who had obtained at least 15% of the

vote on one or more ballots, the Secretary released a statement that pursuant to the April 23 Opinion of the Justices, supra, he would be unable to place on the State primary ballot the names of Langone and Pressman although they had filed valid nomination papers. On the following day the director of elections sent letters to Langone and Pressman containing the same information. This action was commenced on June 2, 1982.

Candidates of political parties for statewide office in this Commonwealth are nominated at primaries held for that purpose. G.L. c. 53, §§2, 41. General Laws c. 53 provides several requirements for primary ballot access, including requirements that only persons certified as enrolled members of a political party

may be candidates for that party's nomination, §48, and that candidates for the nomination of a political party must file nomination papers containing at least 10,000 certified voter signatures. G.L. c. 53, §44.[3] General Laws c. 53, §44, further provides that "[t]he nomination of candidates for nomination at state primaries shall be by nomination papers," and §2, as appearing in St. 1975, c. 600, §7, provides that "[n]o candidates shall be nominated . . . in any other manner than is provided in this chapter or chapter fifty-two."[4] These several sections of G.L. c. 53

3/ Both Langone and Pressman had complied with the requirements of G.L. c. 53, §44, by filing nomination papers containing more than 10,000 certified voter signatures.

4/ General Laws c. 52 is irrelevant to the present inquiry.

may reasonably be construed in two ways: as providing the only requirements for primary ballot access, excluding all others, or, in the alternative, as providing minimum requirements for primary ballot access but permitting imposition by the party of additional requirements that are consistent with a primary election system and do not infringe the constitutional rights of candidates and voters. Under the first construction, a candidate who satisfies the express statutory requirements would have a right to the printing of his or her name on the primary ballot. Under the second construction, compliance with the express statutory requirements would not entitle candidates to appear on the

ballot in the absence of compliance with the party rule also. If we were to adopt the first construction, we think that G.L. c. 53 would be unconstitutional. However, we think that, since the provisions of G.L. c. 53 are not expressly preemptive, the second construction is permitted by reasonable principles of construction and would avoid constitutional difficulties. Therefore, we adopt it. "It is our duty to construe statutes so as to avoid . . . constitutional difficulties, if reasonable principles of interpretation permit it." School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 79-80 (1982). Staman v. Assessors of Chatham, 351 Mass. 479, 486-487 (1966). We discuss below our reasons for

concluding that constitutional considerations require the second construction of G.L. c. 53.

In Opinion of the Justices, 385 Mass. at 1204, the Justices stated that the right to associate with the political party of one's choice is an integral part of the freedom of association for the advancement of common political beliefs protected by the First and Fourteenth Amendments to the Constitution of the United States. Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973). The Justices further stated that there is implicit in that freedom a political party's substantial interest in ensuring that party members have an effective role in determining who will appear on a general election ballot as that party's candidate, citing Democratic Party of U.S. v. Wisconsin,

450 U.S. 107 (1981). The Justices noted that the winner by a plurality of a party primary in this Commonwealth becomes that party's candidate in the general election, and that voting in the party primary is open both to voters who are enrolled as party members before the primary and to those who are unenrolled until they request that party's ballot at the polls. G.L. c. 53, §37. They noted also that the registered voters who sign nomination papers need not be members of the party. G.L. c. 53, §46. It followed that if the only requirements for primary ballot access were the existing Massachusetts statutory requirements unaugmented by party rule, "a candidate for statewide election could be placed on the Democratic party ballot and win the

primary, thus becoming entitled to be placed on the general election ballot as the Democratic party candidate, with little or no support from the regular party membership." Id. at 1205. The Justices concluded that this would substantially infringe the Democratic party's right of freedom of association, id. at 1206, and that the Commonwealth's interest in the integrity of the election process does not constitutionally justify elimination of party control over who the party's candidate in the general election will be. Id. at 1207.

In answering the questions reported by the single justice in the case before us, we recognized that advisory opinions, "although necessarily the result of judicial examination and

deliberation, are advisory in nature, . . . not adjudications by the court, and do not fall within the doctrine of stare decisis." Commonwealth v. Welosky, 276 Mass. 398, 400, cert. denied, 284 U.S. 684 (1931). "In accordance with our duty, we examine[d] the [questions reported by the single justice] anew, unaffected by the advisory opinion." Lincoln v. Secretary of the Commonwealth, 326 Mass. 313, 314 (1950). We were aided in that effort by the oral arguments and briefs of the parties. We again concluded that G.L. c. 53 would substantially infringe the Democratic party's fundamental right of association if it eliminated the 15% rule, thus necessitating strict scrutiny, which it does not survive. Bachrach v. Secretary of the

Commonwealth, Mass. Adv. Sh. (1981), 93, 101. More of an intrusion on the party's fundamental right of association than is required to protect the Commonwealth's compelling interest in the integrity of the election process, American Party of Texas v. White, 415 U.S. 767, 783 (1974), Kusper v. Pontikes, 414 U.S. 51 (1973), Rosario v. Rockefeller, 410 U.S. 752 (1973), is not constitutionally permissible. See Ridell v. National Democratic Party, 508 F. 2d 770, 776-778 (5th Cir. 1975). The Commonwealth's interest in the integrity of the election process does not require, and therefore does not permit, preclusion of a party rule that reserves to its convention delegates the right to bar from the party's primary ballot candidates who lack the support of at

least 15% of those delegates on any convention ballot.

In Democratic Party of U.S. v. Wisconsin, 450 U.S. 107 (1981), the United States Supreme Court struck down a State statute that compelled the Democratic party, contrary to national party rules, to seat delegates at its national convention who were bound by the statute to vote on the first ballot in accordance with the results of an open primary. An open primary is one in which any registered voter can participate regardless of party affiliation and without publicly declaring it. The plaintiffs argue that Democratic Party of U.S. v. Wisconsin, supra, stands only for the proposition that a State may not interfere with the internal affairs of a national political

party, such as the naming of the party's delegates to its national convention. We think that the principle enunciated in that case is not so narrow. The Court phrased the question before it as "whether, once Wisconsin has opened its Democratic Presidential preference primary to voters who do not publicly declare their party affiliation, it may then bind the National Party to honor the binding primary results, even though those results were reached in a manner contrary to National Party rules." Id. at 120. Reasoning that "the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions -- thus impairing the party's essential functions -- and that political parties may accordingly protect themselves 'from intrusion by

those with adverse political principles,' Ray v. Blair, 343 U.S. 214, 221-222 [1952]," id. at 122, the Court held that "if Wisconsin . . . open[s] its primary, it cannot require that Wisconsin delegates to the National Party Convention vote there in accordance with the primary results, if to do so would violate Party rules." Id. at 126. To be sure, the Court declared that the Wisconsin statute impermissibly interfered with the party's internal affairs, as the plaintiffs point out, but it is significant that the Court's focus was on the nature of the interference, which was the imposition on the party of convention votes for the party's presidential nominee that may not have reflected the choice of party members.

In order to vote at a Massachusetts primary, an unenrolled voter may enroll in a political party at the polling place immediately before voting, and receive that party's ballot. G.L. c. 53, §37. The voter may become unenrolled again, or change his or her enrollment on the day following the primary. G.L. c. 53, §38. This section also provides that at primaries a clerk shall make available within the polling place certificates to enable a voter to make such changes. Since these provisions require that party affiliation be publicly declared, the Massachusetts primary is not technically "open" as was the Wisconsin primary in Democratic Party of U.S. v. Wisconsin, supra, but the availability of party affiliation to unenrolled voters, which can be little

more than momentary and may be for a purpose that is entirely inconsistent with, or at least unsupportive of the principles of the party, blurs any meaningful distinction between open and closed primaries. See Democratic Party of U.S. v. Wisconsin, supra at 133 (Powell, J., with whom Blackmun and Rehnquist, JJ., joined, dissenting). Such affiliation demonstrates neither commitment to, nor acceptance of, the political, social, and economic philosophies and programs for which the party has organized. "[A] political party has a legitimate -- indeed, compelling -- interest in ensuring that its selection process accurately reflects the collective voice of those who, in some meaningful sense, are affiliated with it. Freedom of

association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being" (emphasis added). L. Tribe, American Constitutional Law 791 (1978).

Since nomination papers may be signed by unenrolled voters, G.L. c. 53, §46, and since voters at the primary may have only a tenuous affiliation with the party, c. 53, §37, if G.L. c. 53 nullifies a party rule requiring that a candidate for nomination have a modicum of support from members with substantial affiliation with the party, it as effectively eliminates that party's control of who its candidates in general elections will be as did the Wisconsin statute held unconstitutional in

Democratic Party of U.S. v. Wisconsin, supra. We view this as a substantial interference with the fundamental rights of association guaranteed to the party and its members by the First and Fourteenth Amendments. Therefore, we reject a construction of G.L. c. 53 that would render ineffective all party rules governing primary ballot access, and we construe the statute as permitting any such rule that neither defeats the purpose of a primary election system nor violates the constitutional rights of candidates or voters.

We turn to a consideration whether a construction of G.L. c. 53 as recognizing the Democratic party's 15% rule would defeat the legislative purpose in providing for primary elections, and we conclude that it would

not. The aim of the primary system is the encouragement of wide participation in politics and discouragement of candidate selection by party bosses. Democratic Party of U.S. v. Wisconsin, supra at 127 (Powell, J., with whom Blackmun and Rehnquist, JJ., joined, dissenting). Popular participation in the candidate selection process is assured by G.L. c. 53, §44, requiring nomination papers signed by at least 10,000 registered voters, and by c. 53, §37, which provides that primary votes may be cast by persons who are unenrolled until they go to the polls. This broad citizen participation is not negated by application of the 15% rule. The fact that five candidates for selection as the Democratic party's candidate for Lieutenant Governor

received sufficient delegate support to satisfy the party charter requirement warrants the inference that the selection process was not dominated by party bosses. The 15% rule does not defeat the legislative purpose in adopting a primary system. We need not consider at what point the legislative purpose would be defeated by a different party rule requiring a higher percentage of delegate support.

Primary elections are the creatures of statute and are an integral party of the election process. United States v. Classic, 313 U.S. 299, 314 (1941). Enforcement by the Commonwealth of the 15% rule is State action and is, therefore, subject to constitutional scrutiny. Bullock v. Carter, 405 U.S. 134, 140 (1972). Terry v. Adams, 345

U.S. 461 (1953). Shelley v. Kraemer, 334 U.S. 1 (1948). Smith v. Allwright, 321 U.S. 649 (1944). Nixon v. Condon, 286 U.S. 73 (1932). Nixon v. Herndon, 273 U.S. 536 (1927). See L. Tribe, American Constitutional Law 787 (1978).[5/] For the purpose of evaluating the plaintiffs' claims that the 15% rule violates rights guaranteed to them by the Federal and State Constitutions, we treat the rule as though it were expressly contained in G.L. c. 53. See L. Tribe, American Constitutional Law 790 n. 2 (1978).

5/ We have recently held that the protection of art. 9 of the Massachusetts Declaration of Rights is not from State action alone. Batchelder v. Allied Stores Int'l, Inc., 387 Mass. 83, 88 (1983). But since we find State action present, we need not decide whether that case negates the necessity of State action under our State Constitution.

We have concluded that G.L. c. 53 would violate the constitutional rights of the Democratic party and its members if it were to exclude every form of primary ballot access control by party members with a more substantial party affiliation than is demonstrated by accepting a Democratic party ballot on primary election day. We have also concluded that enforcement of the 15% rule would not defeat the legislative purpose in adopting a primary system. We must further inquire whether G.L. c. 53, as augmented by the 15% rule, would deprive the plaintiff candidates or voters of rights of free speech and association guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States and arts. 1, 16, and 19 of the Massachusetts

Declaration of Rights, or would violate their rights to equal protection secured by the Fourteenth Amendment or their rights to freedom and equality of elections secured by art. 9 of the Declaration of Rights. The same basic issues relative to the United States Constitution must be addressed whether our analysis be in First Amendment or equal protection terms.

The first question to be resolved is whether State enforcement of the 15% rule must withstand strict scrutiny or only a rational basis test. Strict scrutiny is required if the interests asserted by the plaintiffs are fundamental and the infringement of them is substantial. Bullock v. Carter, 405 U.S. 134, 142-144 (1972). In that event, the 15% rule must serve a

compelling State interest with as little infringement as possible in order to be constitutionally permissible. Bachrach v. Secretary of the Commonwealth, Mass. Adv. Sh. (1981) 93, 101. On the other hand, if the asserted interests are not fundamental or the impact on them of the 15% rule is not substantial, State enforcement of the rule is constitutional if it is rationally based. Bullock v. Carter, supra.

Langone and Pressman assert that enforcement of the 15% rule abridges their rights of candidacy, and the Langone supporters and the Langone Committee assert interference with their rights as voters. Although the right to run for public office may not be a fundamental right, see Bullock v. Carter, supra at 142-143, but see

Mancuso v. Loft, 476 F. 2d 187, 195 (1st Cir. 1973), and it clearly is not absolute, Opinion of the Justices, 375 Mass. 795, 811 (1978), the right to vote is fundamental, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966), Reynolds v. Sims, 377 U.S. 533, 561-562 (1964), see Sears v. Secretary of the Commonwealth, 369 Mass. 392, 399 (1975), and restrictions on the access of candidates to the ballot inevitably have impact on voters' rights. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979). Lubin v. Panish, 415 U.S. 709 (1974). Bullock v. Carter, supra at 143. Therefore, we treat the interests asserted by the candidates, as well as those asserted by the voter plaintiffs, as fundamental.

A determination whether the restrictions on primary ballot access resulting from the application of G.L. c. 53, and the 15% rule have a sufficient impact on plaintiffs' fundamental interests to compel strict scrutiny, requires an examination of that impact "in a realistic light." Bullock v. Carter, supra at 143. Clough v. Guzzi, 416 F. Supp. 1057, 1066 (D. Mass. 1976). We are satisfied that the burden on candidacy and voting rights that results from enforcement of the 15% rule is insufficient to warrant strict scrutiny and that the appropriate inquiry is whether the effect of G.L. c. 53, supplemented by the 15% rule, is rationally related to the furtherance of legitimate State interests. See Storer v. Brown, 415 U.S. 724, 733-736 & n. 7

(1974) (statute disqualifying independent candidate who was registered member of any party within one year prior to primary election, valid); Jenness v. Fortson, 403 U.S. 431 (1971) (independent candidates required to submit petition with signatures of 5% of the eligible voters).

We begin our examination of the impact of the 15% rule with the observation that discrimination between those who gain the support of at least 15% of the convention delegates and those who do not is not invidious. Enforcement of the 15% rule does not deny candidates access to the primary ballot in an unfair way, such as by imposing prohibitive filing fees. See Bullock v. Carter, supra. Everyone who seeks to have his or her name printed on

the Democratic primary ballot has the same opportunity to gather the necessary signatures and convention support. No one is required to obtain a greater precentage of the delegate votes than anyone else. That reasonable opportunity exists to garner the necessary delegate support is demonstrated by the fact that five candidates for the Democratic nomination for Lieutenant Governor did so.

Participation in a primary is not the only route available to the plaintiffs to enable them to associate and express political ideas. Bachrach v. Secretary of the Commonwealth, Mass. Adv. Sh. (1981) 93. A candidate for statewide office is entitled to appear on the general ballot as an independent by compliance with the provisions of

G.L. c. 53, §6. To the extent, however, that the plaintiffs wish to associate and express their ideas as Democrats, those ideas may be represented by the several candidates who obtained the requisite convention support. Every voter cannot be assured that a candidate to his liking will be on the ballot. Lubin v. Panish, supra at 716. "So long as the ideas in which a potential candidate and other party members believe can be represented by another candidate, the primary purpose of political association has been served. A candidate may, of course, prefer to be the party nominee, but judicial cognizance of that interest as an element of associational rights would be merely a backdoor way of establishing [an absolute] right to candidacy."

Developments in the Law -- Elections, 88 Harv. L. Rev. 1111, 1176, 1177 (1975).

Not only does the Commonwealth have a legitimate interest in protecting the constitutional rights of the Democratic party and its members to associate, see South Carolina v. Katzenbach, 383 U.S. 301, 327 (1966), but it also has a proper interest "in maintaining the integrity and stability of existing political parties, thus encouraging responsible action on their part." Tansley v. Grasso, 315 F. Supp. 513, 517 (D. Conn. 1970). This interest is served by assuring that candidates who appear on the general election ballot as representatives of the Democratic party are truly representative of the party as demonstrated by the support of at least 15% of the party's convention delegates

on one or more convention ballots. "The preservation of the integrity of the various routes to the ballot is a proper State objective." Opinion of the Justices, 368 Mass. 819, 823 (1975). We conclude, therefore, that G.L. c. 53, supplemented by the 15% rule, is rationally related to legitimate State interests and does not violate any rights guaranteed to the plaintiffs by the United States Constitution.[6/]

6/ Langone contends that he had insufficient notice of the requirements for primary ballot access and that therefore his right to due process guaranteed by the Fourteenth Amendment was violated by the failur the Secretary to print his name on the primary ballot. This contention is without merit. In December, 1981, the Democratic party issues its "Preliminary Call to Convention," which gave clear notice that the party would be holding its endorsing convention pursuant to Article Six of the party's charter. Any assumption that G.L. c. 53 provided the exclusive requirements for primary ballot access was unwarranted.

Although the plaintiffs claim that State implementation of the 15% rule would violate rights guaranteed to them by arts. 1, 9, 16, and 19 of the Massachusetts Declaration of Rights,[7/]

7/ These articles of the Massachusetts Declaration of Rights state:

Article 1, as appearing in art. 106 of the Amendments to the Massachusetts Constitution, provides: "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

Article 9 provides: "All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments."

(footnote continued)

they advance no separate reasons, and we are unaware of any, to conclude that the Massachusetts Constitution affords them protection not provided by the First and Fourteenth Amendments of the United States Constitution. We have previously said that the freedoms protected by arts. 16 and 19 are "comparable" to those guaranteed by the First Amendment.

(footnote continued)

Article 16, as appearing in art. 77 of the Amendments to the Massachusetts Constitution, provides: "The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this Commonwealth. The right of free speech shall not be abridged."

Article 19 provides: "The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good: give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer."

First Nat'l Bank v. Attorney Gen., 371 Mass. 773, 792 (1977), rev'd on other grounds, 435 U.S. 765 (1978). Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 249 (1946). The Justices have said that "[t]he Massachusetts Constitution does not refer to primaries as such, but concerns itself only with elections." Opinion of the Justices, 359 Mass. 775, 776-777 (1971). Even if the Massachusetts Constitution were to apply to primaries because of their effect on general elections, "the right 'to be elected,' preserved in art. 9, is not absolute. It is subject to legislation reasonably necessary to achieve legitimate public objectives." Opinion of the Justices, 375 Mass. 795, 811 (1978). See Opinion of the Justices, 368 Mass. 819, 823 (1975).

Thus, we have completed the constitutional analysis which requires that we construe G.L. c. 53 not to exclude, but rather, to accomodate the 15% rule. No candidate who fails to obtain at least 15% of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III, of the "Charter of the Democratic Party of the Commonwealth" must appear on the Democratic State primary ballot. The decision of the Secretary of the Commonwealth to that effect did not violate the constitutional or statutory rights of the voters, candidates, or candidates' supporters.